No. 14316

United States Court of Appeals

For the Ninth Circuit

JULES GARRISON,
Appellant,

vs.

WARNER BROTHERS PICTURES, INC., a corporation,
Appellee.

Appeal from Judgment for Defendant and Order Denying Costs and Attorney's Fees Under Rule 37(c), F. R. C. P.

Opening Brief on Appeal

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JURISDICTION

This is a diversity of citizenship case brought under Title 28, Section 1332 and 1391, U. S. Codes.

The plaintiff, a citizen of the County of Los Angeles, State of California, brought this action against Warner Brothers Pictures, Inc., a Delaware corporation, doing business at Los Angeles, California, State of California.

Appellate jurisdiction is had by reason of Section 1291, Title 28, U. S. Codes. Judgment was entered and

filed September 30th, 1953. (R. 48-49). A motion for attorney's fees, costs and expenses under Rule 37(c) for giving a false answer was denied. (R. 70).

A motion for a new trial was noticed on October 8th, 1953 (R. 49-50), which came on for hearing on Monday, November 30th, 1953, at 10:00 A. M. (R. 62). The said motion of plaintiff for a new trial came on for hearing on December 28th, 1953 (R. 69), and was denied. A notice of appeal was filed January 21st, 1954 (R. 70). This Opening Brief is filed within the time fixed by law and extensions thereof granted by a judge of the United States Court of Appeals.

STATEMENT OF THE CASE

This is a suit by the plaintiff, Jules Garrison, against Warner Brothers Pictures, Inc., for $1,000,000.00 for breach of contract. The breach grows out of an offer of the defendant studio made through its star in a picture called "The Flame and The Arrow", Burt Lancaster, to pay $1,000,000.00 to anyone who could prove that Burt Lancaster did not do all the stunts he is shown doing in a new picture (R. 305) and published at his instigation and the instigation of the studio on July 17th, 1950, in the Los Angeles Mirror, a daily newspaper of general circulation and a similar offer made in a Warner Bros. Newsreel "to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in "The Flame and The Arrow." (R. 313).

The offers were made by Warner Brothers through its star, Burt Lancaster, through its publicity department as a part of an advertising campaign to build Burt Lancaster into a star position similar to the type once held by Douglas Fairbanks—stated by Mr. Alex Evelove, a publicity agent for Warner Brothers Pictures Corporation, which he directed:

> **"We wanted to prove that perhaps not since Douglas Fairbanks had there been an actor who could do the acrobatic stunts that Mr. Lancaster can do and that was the whole purpose of the campaign."** (R. 98).
>
> **"Q. And that was to prove that he himself had done them rather than someone else, is that correct?**
>
> **"A. That is right. And the film was photographed, as I remember, so that the camera would be on Mr. Lancaster when he did the acrobatic stunts so that the publicity and the stunts and everything would jibe."** (R. 98).

Warner Brothers Pictures issued publicity releases for the picture through Mr. Evelove and sent them to the newspapers. (R. 93). They also arranged for a Warner Brothers newsreel to take the newsreel of Burt Lancaster (R. 101)—Warner-Pathe Newsreel is a wholly owned subsidiary of Warner Brothers Pictures, Inc. (R. 102). Mr. Evelove saw the newsreel after it was returned to Los Angeles and made no changes in it after it was sent out.

The picture, "The Flame and The Arrow", starring Burt Lancaster, was produced by Norma Produc-

tions, financed by Warner Brothers (R. 113), of which Mr. Lancaster was an officer. It was produced on the Warner Brothers' lot, using Warner Brothers' facilities, and financed by Warner Brothers under an agreement by which the picture would be distributed by Warner Brothers for a period of fifteen years and to collect all the money from distribution and after all those costs had been repaid, the balance, if any, would be divided between Norma Productions, Inc., and Warner Brothers Pictures, Inc. (R. 114)—Plaintiff's Exhibit No. 7, R. 314 (a typical producer-distributor contract). The publicity was one of the costs which was to be deducted and was to be handled through Warner Brothers' publicity department. (R. 115).

In furtherance of the program of building Burt Lancaster into a great athletic star, Warner Brothers' publicity department arranged for Burt Lancaster to go to the vault of the Bank of America and posed for a picture of publicity purporting to show $1,000,000.00 to be offered as a reward. (R. 121) (R. 305). And there he caused the offer to be publicized by the Los Angeles Mirror on July 17th, 1950. (R. 305). That offer was as follows:

> "THERE'S A $1,000,000 FOR YOU; JUST PROVE BURT DIDN'T DO IT
>
> "Things can't be so bad in the movie business. Warner Bros. offered to give away $1,000,000 today.
>
> "It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture.

"In 'The Flame and The Arrow,' apparently no drawing-room drama, Lancaster performs somersaults from horizontal bars, walks across a pole 35 feet above ground, and scales walls like a window washer gone berserk.

"Virginia Mayo costars with Lancaster in the film. Enough to make any man acrobatic."

The newsreel was also released, Plaintiff's Exhibit No. 6, which read as follows:

"ACTUAL NEWSREEL SCRIPT

"Annor.: In Hollywood, Burt Lancaster counts the one million dollar reward offered by Warner Bros. to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in 'The Flame and The Arrow.'

"Lancaster: 999,999,999,999, One million dollars. I had to count it three times to make sure.

"Girl: Here he is, ladies.

"Rocklin: Hello, Burt. I'm Miss Rocklin of the Los Angeles Mirror.

"Lancaster: How do you do?

"Rocklin: Tell me, is this really on the level?

"Lancaster: Really on the level? Well, so much so that I'm trying to figure how to win it myself.

"Marsh: Burt, I'm Marilyn Marsh of International News Service.

"Lancaster: How do you do, Ma'am?

"Marsh: I just saw you in 'The Flame and The Arrow.' Now look. You can't make me believe that it was you doing those somersaults from, what was it, six horizontal bars, 50 feet in the air?

"Lancaster: Sixty feet. Why not? Before I got lucky in Hollywood, I used to make my living in the circus. I did stuff like that for coffee and donuts.

"Marsh: What happened if you missed?

"Lancaster: Somebody got an extra donut.

"Helming: Burt, I'm Ann Helming of the Hollywood Citizen-News.

"Lancaster: Well, hello.

"Helming: It's hard to believe that any producer wants to give away a million dollars.

"Lancaster: Well, Ann, they really don't want to give away a million dollars if they can help it. But this is a genuine, bona fide offer.

"Helming: What if somebody proves that it wasn't you who walked across the pole 35 feet in the air?

"Lancaster: If anybody can prove that, they'll get the million dollars and I'll go back to coffee and donuts. Satisfied?

"Rocklin: Sounds good enough for me. Come on, girls, let's take another took at 'The Flame and The Arrow.' "

Plaintiff first saw the newsreel offer in July, 1950. (R. 142). He knew Don Turner, a stunt man, and had seen him around the studios. (R. 143). When he saw the picture, "The Flame and The Arrow", particularly as it related to playing the part of Dardo in the picture, he recognized Don Turner, and not Burt Lancaster, at the head of the band of horses in the courtyard where the big fight takes place and in the

rescue of Papa Pietro and in the roof stunt—going up on the roof. That was where the midget was carried on his shoulders up over the roofs, and there were other places. (R. 144). He also observed that in the fight sequences with relation to the duel between Allesandro and Dardo that it appeared to be Turner and not Lancaster. He telephoned the studio (R. 144-145), and they couldn't decide who to turn him over to, so they finally turned him over to Freston & Files, attorneys for Warner Brothers. He then talked to Mr. Gordon Files.

> "I said that I had seen the motion picture called The Flame and The Arrow or, rather, I had seen the offer in the newsreel wherein Burt Lancaster had, in behalf of Warner Bros., offered $1,000,000 to anyone who could prove that 'I do not do all of the stunts in the picture,' and I said that I felt sure I could prove it and told them that I had tried to get the award accepted publicly in some way but didn't do it so I was calling them up to let them know and they didn't want to give me the $1,000,000 and I told them I would go and get a lawyer and try to get it for myself. That was about the substance of it."

Having been rejected by Mr. Files, he then consulted Mr. Morris L. Marcus, an attorney, who then forwarded acceptance of the offer and a demand of the reward to Warner Brothers Pictures (R. 386).

On cross examination, Mr. Garrison testified that he had not only seen the newsreel, but he had seen the newspaper article in the Mirror (R. 150-151). He

stated that in his conversation with Mr. Files he could prove that Mr. Lancaster did not do all his own stunts and he would like the $1,000,000. Mr. Files stated he didn't know anything about it, (R. 151) and he went on to explain some of the stunts that he thought Mr. Lancaster didn't do. He might have mention Billie Curtis, the midget, and that Billie Curtis had admitted being carried up on the roof by *Don Turner* (R. 153), and he might have told Mr. Files that Alan Pomroy admitted to him that Don Turner did the stunt of climbing up on the roof (R. 153). He admitted that he said he would take less than $1,000,000 (R. 155) but did not mention the amount, and that he might have said that he wanted to go to New York for the current theatrical season and try to work there, and in order to accomplish that he needed a suit of clothes and transportation and some spending money (R. 155), and that something could be done for him without the necessity of his taking any action which would publicize the claim (R. 156).

Garrison and Files had some discussion about settling the matter without the possibility of his having to take any action to cause any publicity on the claim. He denied that Mr. Files told him that if any such offer had been made he wanted him to know it was withdrawn. Gordon Files, attorney for Warner Brothers, testified having three conversations with Garrison. In the first:

> "He then proceeded to tell me that he had learned of some advertising which had been put

out stating that Warner Bros. would pay a million dollars to anybody who could prove that Burt Lancaster had not done all of the stunts that were credited to him in the motion picture The Flame and The Arrow.

"I said something to the effect that I wasn't familiar with that, and Mr. Garrison then proceeded to tell me more.

"He said that he had worked on the picture as an extra; that he knew about this offer having been made, and that he believed that he could prove that Mr. Lancaster had not done certain of the stunts.

"The ones he referred to particularly, and that he mentioned in that phone conversation, were three. One was, he said, climbing up on to the rooftop with the little boy. Mr. Garrison said that was done by Don Turner and by Billie Curtis, a midget. He said he did not know whether he could get those people to testify for him or not, but that he knew that those people had done that, and that they would have to say that.

"The second thing he mentioned was horseback riding. He said he knew that Mr. Lancaster had not done some of the horseback riding and that the Hudkins brothers, who had furnished the horses would be willing to say that they helped Don Turner get on one of the horses for one of the sequences in the picture.

"He told me that he had talked to Alan Pomroy about this; that Alan Pomroy had admitted that it was Don Turner who had climbed up on the roof of the house and that he, Garrison, had a recording of his conversation with Mr. Pomroy.

"He said he knew that Don Turner's name had been mentioned on the call sheet out at the studio for certain days, indicating that Mr. Turner had worked on this picture.

"He said that we would probably find out in the wardrobe a duplicate Dardo costume which had been up for Don Turner." . . .

Mr. Files told him he didn't know anything about it, hadn't seen the picture and didn't know the circumstances. He said he got a second phone call from Mr. Garrison, at which time he told him that he had made an investigation and it was our understanding that Mr. Lancaster had performed all of his own stunts in the picture. (R. 191). He said that if he couldn't make any arrangements he was going to hire an attorney and that he would give him a week to think it over. On the second conversation, Mr. Files stated:

"Mr. Garrison or a person who introduced himself as Jules Garrison, and it was the same voice that I had talked to the first time, telephoned me at my office, got me on the phone and asked me what we had decided to do. I told him that I had made some investigations and it was our position that no offer had been made; that if he thought there had been any offer made it is withdrawn and he should consider it withdrawn. I told him further that I had made some investigation as to how the picture had been made and that it was our understanding that Mr. Lancaster had performed all of his own stunts in the picture.

"Mr. Garrison said he could prove the things that he had talked to me about in the previous con-

versation and that if he couldn't make an arrangement with us he was going to employ an attorney. He said that he would give us a week to think it over.

"I think again he mentioned that he would prefer to handle it directly and not have an attorney in on it. He said that if he didn't hear from us in a week he was going to go to an attorney." (R. 191-192).

A week later they received a letter from Mr. Marcus dated October 20th, and he had a phone call from Mr. Marcus. Mr. Files stated to Mr. Marcus:

"that we had received his letter dated October 20th, 1950; that our position was that Warner Bros. had made no offer; that if any offer should be deemed to have been made in the past, it had been revoked, and, furthermore, I told him that Mr. Garrison was mistaken as to the facts, that Mr. Lancaster had actually done all of his own stunts in the picture, The Flame and The Arrow." (R. 193).

Proof at Trial That Don Turner Did Stunts in Picture Doubling for Lancaster

In the trial it was conceded that Burt Lancaster was taken to Warner Brothers Newsreel under the direction of the publicity department for the newsreel offer.

DONALD TURNER, stunt man who does doubling and stunt work in the picture business (R. 164) testi-

fied that he had been engaged in that business for twenty years, and Turner testified as follows:

"Q. Do you recognize that picture that you saw here in court as being the same identical picture as the first one you saw?

A. I would say so, yes.

Q. Now, particularly directing your attention to the character Dardo, do you recall the sequence in it where Burt Lancaster, in the part of Dardo, shoots an arrow which purports to hit the falcon?

A. Yes.

Q. In the court yard?

A. Yes.

Q. And then shortly after that Ulrich tells the soldiers to seize the boy. Do you remember that sequence?

A. Yes.

Q. Now, there was a sequence immediately following that that shows Dardo running across the top of this peaked roof, shortly before the time that he is struck by an arrow. Who played the part of Dardo running across the roof with the boy in his arms in that sequence?

A. I doubled for Mr. Lancaster running across the roof.

Q. And that was you portrayed on the rooftop; is that correct?

A. Yes.

Q. With relation to the character Rudie, that is, the boy, do you remember who it was that you carried across the roof at that time?

A. Yes, I member.

Q. Who was it?

A. Billie Curtis.

Q. Is that Billie Curtis, the midget?

A. Yes, sir.

Q. Now, directing your attention to the sequence where the soldiers ride—or, not the soldiers, but the band rides into the court yard to rescue Papa Pietro with these sapling spears,—do you recall that?

A. Yes.

Q. All right. Now, in going into the court yard there with the spears, and in this hand-to-hand encountering, what character did you portray?

A. I doubled for Burt Lancaster in the part of Dardo.

Q. Then you were the character Dardo?

A. I rode into the square.

Q. And in the course of that sequence there, you engaged in some part in the fight with the soldiers, where you were using the sapling spears; is that correct?

A. Enough to bring the two factions together.

Q. And then in that following sequence, where the character Dardo jumps on to the oxcart and cuts Papa Pietro down, and drives the team out of the square, what part did you play in that sequence?

A. I doubled for Burt Lancaster.

Q. In the character of Dardo?

A. In the character of Dardo, and I drove one horse out, not a team.

Q. Now, getting along to the next sequence, and that is the one involving—do you recall near the end of the picture is where there is a sword fight between Alessandro and Dardo that occurs there at the time that Dardo kills Alessandro?

A. Yes.

Q. Now, that was the one that occurred in the castle shortly before the time that Ulrich was killed by the bow and arrow by Dardo; isn't that right?

A. Yes, I think so. Yes.

Q. Now, in that sword fight or duel, particularly as it related to the shots that were taken showing the two men dueling, where it was taken from the back of the character Dardo and showing the face view of Ulrich—I mean of Alessandro, were you playing the part of Dardo in that sequence at that time?

A. I think I worked in two shots that we saw in the picture.

Q. In that duel, with you back to the camera; is that correct?

A. That is correct.

Q. Were you there at the time that these purported arrow shots were made with relation to the piercing of the falcon, and the shooting of Ulrich?

A. I think I was on salary on the picture. I didn't actually see it being done.

Q. Now, with relation to these particular shots, let's take the roof shot, for example—

Mr. Williams: Just a minute. You used the word 'shot' in connection with the arrow, and now you are using the word 'shot' in another way.

Mr. Dryden: I will reframe it.

Q. (By Mr. Dryden): I am not speaking about shooting an arrow. You said you don't recall being there watching that scene?

A. No, I wasn't.

Q. In this situation where yau carried Billie Curtis across the roof, you were on stunt man's pay at that time, were you?

A. I am always on stunt man's pay, as you call it; that or a double's pay, at any time I work in the studio.

Q. Then, in addition to that, when you are working, if you do something such as a stunt, you will receive a pay adjustment; isn't that right?

A. You receive adjustments for your ability to save time, your knowledge as a person doing doubling work, and for additional—well, work, in any sense you might want to phrase it.

Q. With relation to the sequence of running across the roof with Billie Curtis, you did receive additional or adjustment pay of $145 approximately for that sequence; isn't that correct?

A. I received more money. I don't know what it was per day.

Q. In the sequence when you were engaged in the dueling, you received more money; isn't that correct?

A. I always do.

The Court: What do you mean, you always do?

The Witness: My salary is known through the studios for doing fencing, as above the minimum of $70 a day, and I get a minimum of $100 a day.

The Court: When you do fencing?

The Witness: When I do fencing, because there is an adjustment.

The Court: How about this roof incident? Did you get any extra pay for that?

The Witness: I did, yes, sir.

Q. (By Mr. Dryden): And with relation to the fight with the saplings when you came into the court yard and rescued Papa Pietro, you received extra pay for that, didn't you?

A. I did. (R. 164-168).

The trial court made Findings of Fact in which it set out that on or about July 17, 1950, the defendant, acting through its Studio Publicity Manager, cause Burt Lancaster to appear at the vault of the Los Angeles bank, where he was photographer by a motion picture camera and a newsreel sequence prepared showing said Burt Lancaster behind the bars in said bank vault in his shirt sleeves purporting to count money, to-wit, One million dollars. (R. 40).

But, in the said Findings, the Court finds that the language originally sent by the Publicity Department was re-edited by the film editors or script writers in the employ of Warner News, Inc., and put in the following words:

"In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone who can prove that Burt himself did not perform his daring stunts in The Flame and The Arrow."

in the newsreel. (R. 42, 43).

The court in this Finding finds that: " . . . said defendant did not offer to pay the sum of $1,000,000 or any sum to anyone who could prove that said Burt Lancaster did not do or perform all the stunt he was shown doing or purported to perform in said motion picture." (R. 43).

The court finds that the newsreel and the newspaper in which the reward was offered was received as Exhibit 6, but found that it was not true that the plaintiff did not gather or seek evidence or proof as required by said alleged offer or accept the offer and did not notify defendants of plaintiff's acceptance of the offer.[1] (Para. III, R. 43).

The court made Findings of Fact set out Conclusions of Law. (R. 40 to 47).

It finds that the defendant did not offer to pay $1,000,000 or any sum to anyone who prove that Burt Lancaster did not do or perform all the stunts he was shown doing or purported to perform in said motion picture. (R. 43). Then it finds that the plaintiff did not accept the offer as shown in the newspaper article and in the Motion Picture reel. (R. 43, sub. 3). Then it finds that plaintiff did not submit proof; then it finds that plaintiff did not perform any or all the conditions required by the contract to be performed on his part. (R. 44). Then, it finds that the alleged

[1]This is directly contrary to the evidence. The offer was to anyone who "can prove" etc. (R. 305; R. 313). The plaintiff communicated his acceptance to the studio and to Gordon Files, its attorney. (R. 144 et seq.; R. 187).

offer was, in fact, expressly withdrawn, before plaintiff attempted to accept the same. (R. 45, paragraph IX). Then it finds that Burt Lancaster himself actually performed "all his daring stunts shown in the picture The Flame and the Arrow," but further finds that Don Turner doubled for Burt Lancaster in carrying the character Rudi for about twenty-five feet along the crest of a roof, and carried a midget; but finds that this was not a stunt and this was not daring or dangerous. He also finds that in the sequence which shows a character Dardo riding into the courtyard on a horse which he brings to a stop, and in which he steps from the horse to a bed of a stationery two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart from the courtyard, was performed by one Don Turner, who doubled in said sequence for Burt Lancaster, but that the action of said sequence did not constitute a stunt, nor was it daring or dangerous. Without limiting the effect of the Court's finding that said Burt Lancaster did personnally perform all of his daring stunts in said picture, the Court finds specifically that he did do the entire sequence of the duel in which the character Dardo is shown fighting the character Alessandro, and that the only portions of said sequence which appeared on the screen in which the character Dardo is portrayed by a double, are two shots showing a portion of the shoulder and arm of Don Turner doubling for Lancaster. The Court also finds that said duel sequence was not a stunt and was not daring or dangerous. (R. 45, 46).

The court then concludes:

I.

"That no valid offer as set forth in the complaint herein was made by defendant Warner Bros. Pictures, Inc.

II.

"That said alleged offer was not accepted by the plaintiff herein nor was any attempt made to accept said alleged offer until after the same had been expressly withdrawn.

III.

"That Burt Lancaster himself did perform all his daring stunts in the motion picture The Flame and the Arrow.

IV.

"That the sequences shown in the picture The Flame and the Arrow wherein Don Turner appeared as a double for Burt Lancaster were not stunts and were not daring or dangerous." (R. 46, 47).

Upon these Findings, the Court gave judgment to the defendant corporation.

The court also denied a motion for attorney's fees and costs under Rule 37(c), F. R. C. P. although the defendant admitted giving a false answer to interrogations under Rule 36.

SPECIFICATION OF THE ASSIGNED ERRORS

The appellant specifies the following errors upon which he relies:

I.

The findings and conclusion of law, and each of them, are contrary to the law and the evidence.

II.

The decision and judgment of the United States District Court are contrary to the law and the evidence. An offer of reward was made and published throughout the nation, and accepted by the plaintiff. The plaintiff is entitled to the reward thus offered.

III.

The District Court erred in deciding and finding that, although an offer had been made by Warner Pictures, Inc., and in connection therewith an offer of $1,000,000.00 reward was offered if it could be proved that the star in the picture did not perform all the stunts therein shown, the plaintiff was not entitled to the reward because it had been withdrawn prior to the acceptance thereof.

IV.

The District Court erred in finding that an offer of reward made publicly through the medium of motion pictures can be withdrawn in any manner and in any way other than in the same manner in which the offer

was made. The evidence is that there was no such withdrawal.

V.

The District Court erred in deciding and finding that the acts of the hero in the picture (Burt Lancaster) which were not performed by him were not "stunts" within the meaning of the offer of reward.

VI.

The District Court erred in failing to make specific findings in accordance with the admitted and undisputed evidence, as follows:

(a) That the defendant Warner Brothers Pictures, Inc., a corporation, together with Norma Productions, Inc., a corporation, made the motion picture of "The Flame and the Arrow" under a contract, and after this motion picture was made it was distributed by Warner Brothers Pictures, Inc.

(b) That the defendant Warner Brothers Pictures, Inc., made a Newsreel offer, as part of its publicity campaign to distribute and sell the motion picture"The Flame and the Arrow", in which it offered a reward to the public, generally, including the plaintiff, of $1,000,000.00 to anyone who could prove that Burt Lancaster did not do or perform all of the stunts he was shown doing in the new picture "The Flame and the Arrow."

(c) The District Court erred in failing to find that in the Newsreel offer of reward to the public generally,

there were scenes taken in a bank vault in which Burt Lancaster and three newspaper reporters were shown in the presence of stacks of money, represented to be $1,000,000.00 in cash, and this newsreel had the following dialogue:

> "In Hollywood, Burt Lancaster counts the One Million Dollar Reward offered by Warner Brothers to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in 'The Flame and the Arrow.'"

(d) The District Court failed to find the undisputed fact that at about the time of the showing of the newsreel set out in the foregoing assignment, a news item appeared in the Los Angeles Daily Mirror, a newspaper of general circulation in Los Angeles County, which news item was based upon a press release issued by Warner Brothers Pictures, Inc., and was authorized, showing a picture of Burt Lancaster and the newspaper reporter, Kendis Rochlen, underneath which picture it was stated:

> "$1,000,000 if you can prove Burt didn't do it.
>
> "Things cannot be so bad in the movie business. Warner Brothers offered to give away $1,000,000 today. It is waiting in cash for anyone who can prove Burt Lancaster did not do all the stunts he is shown doing in a new picture. In 'The Flame and The Arrow,' apparently no drawing room drama, Lancaster performs somersaults from the horizontal bars, walks across a pole 35 feet above ground, and scales walls like a window washer, gone beserk."

This publication was made pursuant to press releases of Warner Brother Pictures, Inc., and never repudiated or withdrawn by them.

(e) That the District Court erred in failing to find that the defendant Warner Brothers Pictures, Inc., did not repudiate or disavow or withdraw the same publication or announcement, nor its newsreel offer at the time the plaintiff accepted the same, nor did it ever publicly repudiate or withdraw the offer. That it was accepted by the plaintiff and proof offered by him, which was rejected by the defendant.

VII.

The District Court erred in finding, contrary to the evidence, that the plaintiff failed to accept the offer and failed to notify defendant Warner Brothers Pictures, Inc., and its attorneys of said acceptance, and failed to notify them of the facts constituting the acceptance.

VIII.

The District Court erred in Finding of Fact X that the activities therein described, performed by Don Turner, a Hollywood stunt man, for Burt Lancaster, did not constitute stunts. This is clearly against the weight of the evidence, and the further finding that said stunts were not daring or dangerous is against the weight of the evidence.

IX.

Errors of law occurred at the trial, namely:

(a) The ruling in substance by the Court that acts done by agent corporations of defendant were not done by defendant.

(b) The interpretation of the offer in a strained and unnatural manner against plaintiff, when the offer was prepared by defendant, and the plain, reasonably meaning as contended for by plaintiff would give it life. The construction urged by the defendant and adopted by the court was one in favor of the defendant and against the plaintiff and made it meaningless and a trick and snare.

X.

The violation of Rule 33 of the Federal Rules of Civil Procedure by defendant in giving false answers under oath to Interrogatories submitted to said defendant, namely to Interrogatories No. 10 and No. 11.

XI.

The violation of Rule 36 of the Federal Rules of Civil Procedure by defendant in giving false answers to Request for Admission, namely to Request No. 3.

XII.

The District Court erred in failing to grant plaintiff's motion for attorneys fees and expenses under Rule 37 (c), which is designed to enforce the provisions of Rule 36. The rule is mandatory that a judge shall allow

a reasonable fee to attorneys bringing the suit, where the defendant fails to respond fully and truthfully to request for admissions.

XIII.

The District Court erred in failing to grant plaintiff's attorneys reasonable compensation for 250 additional hours of time spent and $600.00 expense incurred by reason of the failure of the defendants to make admission and thus "to expedite the trial and relieve parties of the costs and labor of proving facts which would not be in dispute on the trial and the truth of which could be ascertained by reasonable inquiry."

SUMMARY OF THE ARGUMENT

On or about July 17th, 1950, the defendant corporation, acting through its studio publicity department, caused publicity to be broadcast in the newspapers, to-wit, the Los Angeles Daily Mirror, a newspaper of general circulation, and its own motion picture newsreel, in which it offered One Million Dollars to anyone who could prove that Burt Lancaster (the star whose picture was depicted in the newsreel and the newspaper) did not perform the stunts in which he is shown doing in the picture "The Flame and the Arrow." The purpose of this publicity was to build up Burt Lancaster into another Douglas Fairbanks and to convince the world and the public wherever these pictures were shown that he was highly acrobatic and a skilled actor. Actually two different offers were

made. In the newspaper article in which he posed for pictures and caused to be published, the offer was $1,000,000 cash to anyone who can prove Burt Lancaster didn't do all the stunts. (R. 305). "It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture." (R. 305).

In the newsreel disseminated by a subsidiary corporation of Warner Brothers, the offer was $1,000,000 reward offered by Warner Brothers to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in "The Flame and the Arrow." (R. 313, R. 42-43). The offer was made and disseminated through the motion picture theatres of defendants' distributing corporations, and through the Los Angeles Mirror. It was thereafter published and broadcast and distributed and seen by plaintiff and the general public.

The plaintiff saw the motion picture and the newsreel, and thereafter communicated with Warner Brothers his acceptance of the offer, and offered to prove by telephone to Warner Brothers and to its attorney that Burt Lancaster did not perform all the stunts he was shown doing in the picture, and did not perform all his daring stunts shown in the picture. That the offer to prove these facts was made to Gordon Files, attorney for Warner Brothers Pictures, Inc., by the plaintiff personally and later by his attorney Morris L. Marcus.

An attempt was made by Gordon Files to withdraw the offer to the plaintiff personally, but the defendant at no time ever withdrew the offer in the same form or manner in which the offer was made.

That the plaintiff did communicate with Gordon Files, attorney for the defendant, that he can prove that Burt Lancaster did not do the stunts he is shown in the "Flame and the Arrow" to be doing and this constituted acceptance of the offer and a binding contract with the defendant. The plaintiff further did prove by admissions of the defendant and at the time of trial that Burt Lancaster did not perform many of the stunts shown in the picture in which it was represented that he did perform. That among the sequences in the picture which he did not perform was one showing the character "Dardo carrying the character Rudi for about twenty-five feet along the crest of the roof, in the distance and silhouetted against the sky." That this stunt was not performed by Burt Lancaster but by Don Turner, who doubled for Lancaster and carried a midget.

Plaintiff proved that in the sequence that showed the "character Dardo riding into the courtyard on a horse which he brings to a stop, and in which he steps from the horse to the bed of a stationary two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart from the courtyard, was performed by Don Turner,. who doubled in said sequence for Burt Lancaster." That in the duel scene between Burt Lancaster in which

the character Dardo was shown fighting the character Alessandro, there are shots of Don Turner doubling for Lancaster.

That upon the publication either through newspaper and its newsreel which Warner Brothers Pictures caused to be disseminated its offer of One Million Dollars it was a unilateral offer which upon acceptance became a binding contract. That the plaintiff did accept the offer and at no time was the said offer ever withdrawn as required in the case of an offer, by publication or pictures, and that the plaintiff's acceptance of the offer created a valid, binding contract which the defendant was required to perform and carry out. That the trial court's decision is contrary to law.

That the finding of the trial court are inconsistent, inadequate and contrary to the law and the evidence.

That plaintiff is also entitled to counsel fees and costs under Rule 37(c) for the reason that the defendants made false answers to the request for admissions under Rule 36 of the Federal Rules of Civil Procedure and Federal Rules of Civil Procedure §37(c).

That the defendants admitted that it falsely answered the question regarding the portrayal by double Don Turner for Burt Lancaster of the sequence in the picture "The Flame and the Arrow." (R. 66). And said admission of falsity entitles the plaintiff to said counsel fees and costs as prayed for.

ARGUMENT

I.

THE DECISION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT ARE CONTRARY TO THE LAW AND THE EVIDENCE. AN OFFER OF REWARD WAS MADE AND PUBLISHED THROUGHOUT THE NATION, AND ACCEPTED BY THE PLAINTIFF. THE PLAINTIFF IS ENTITLED TO THE REWARD THUS OFFERED.

The defendant, through its agents and representatives, caused two offers of reward to be made and broadcast.

The defendant corporation caused an offer of reward of $1,000,000 to be made in the Los Angeles Mirror, on Monday, July 17, 1950, as follows:

> "Things can't be so bad in the movie business. Warner Bros. offered to give away $1,000,000 today.
>
> "It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture." (R. 305).

Another offer of $1,000,000 was made in the newsreel, as follows:

> "In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone who can prove that Burt himself did not per-

form his daring stunts in 'The Flame and the Arrow.' " (R. 42, 43).

The plaintiff accepted the offer. The offer never was withdrawn, even to this date, in the form and manner required by law, which is through the same medium as the offer.

The plaintiff in this case not only could prove the offer being to anyone who "can prove"—but did prove —that the actor Burt Lancaster did not perform "all his stunts shown in the picture, nor all his daring stunts." The offer to anyone who "can prove" and communication of acceptance alone to the defendant corporation, or its attorney, was sufficient to establish a binding contract. The abortive attempt of the attorney to "withdraw" the offer after the plaintiff had communicated with him was not and could not avoid the plaintiff's acceptance and binding effect of the contract.

The case being tried in California and the offer having been made in California is governed by the laws of the State of California.

Erie v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

In *Ryer v. Stockwell,* 14 Cal. 134, 73 Am. Dec. 634, it was held that the offer of reward of compensation by public advertisement, either to a particular person or a class of persons, or to any and all persons, is a conditional promise. That if anyone to whom such offer is made shall perform the service before the offer

is revoked, such performance is a good consideration and the offer becomes a legal and binding contract and may be enforced by a person performing the services. (See *Wilson v. Stump,* 103 Cal. 255).

And, before an offer of reward can be revoked—it can only be revoked in the same form and manner that the offer was made, and with the same amount of publicity or publication.

Shuey v. U. S., 92 U. S. 73, 23 L. Ed. 697.

In *Carlill v. Carbolic Smoke Ball Co.,* 1 Q.B. 256, the proprietor of a medicine published an offer to pay one hundred pounds to anyone who should use his medicine as directed and thereafter catch influenza. In reliance on this, the plaintiff used the medicine and caught the influenza. The use of the medicine was an operative acceptance consummating a unilateral contract. No notice was necessary.

The contract in this case was a unilateral contract which was consummated as soon as the first substantial act had begun by the plaintiff. And see the following cases:

Robertson v. U. S., 343 U. S. 711; 96 L. Ed. 1237, 1240;

Williams v. United States, 12 Court of Claims 192;

Stone v. Dysert, 20 Kans. 123;

Mosley v. Stone, 56 S. W. 965, 108 Ky. 492;

Louisville & M. R. Co. v. Goodnight, 10 Bush 552, 19 Am. Rep. 80;

Stevens v. Brooks, 2 Bush 137.

Where a reward has been offered for the finding and return of lost property, the offer is not revokable after part performance in reliance upon it, even though the offerer gives notice before there has been an actual return of the property. Even in such case the finder has the lien to secure payment of the reward.

Wilson v. Guyton, 8 Gill. 213 (Md), Mass.;
Wentworth v. Day, 3 Met. 352, 37 Am. Dec. 145;
Wood v. Pierson, 7 N. W. 888, 45 Mich. 313;
McFarlane v. Bloch, 115 Pac. 1056, 59 Ore. 1; Ann. Cas. 1913B 1275;
Cummings v. Gann, 252 Pa. 484;

In *Robertson v. U. S.,* 343 U. S. 711, 96 L. Ed. 1237, 1240 the court said:

> "The acceptance by the contestants of the offer tendered by the sponsor by the contest creates an enforceable contract. See 6 Corbin on Contracts, Sec. 1489; Restatement, Contract, Section 521."

See also published offers of reward, *Scott v. People's Monthly Company,* 228 N. W. 263, 209 Iowa 503, 67 A. L. R. 413; *Reif v. Paige,* 13 N. W. 472, 55 Wis. 496, 42 Am. Rep. 731.

The plaintiff accepted the reward before there had been any revocation as required by law. To this date there never has been any revocation, either in newsreel or newspaper publicity.

The rule regarding revocation is set forth by the United States Supreme Court in *Shuey v. United*

States, 92 U. S. 73, 23 L. Ed. 697, to the effect that where an offer has been made by a publication to a large number of unidentified persons, the power of acceptance is created in all those who read it. This power can be terminated or revoked by publication in the same manner as the offer.

The rule set forth in Restatement of the Law on Contracts, Section 43, is that:

> "An offer made by an advertisement in a newspaper, or by general notification, to the public or to a number of persons whose identity is unknown to the offerer is revoked by an advertisement or general notice given publicity equal to that given to the offer before a contract has been created by acceptance of the offer."

In *Carr v. Mahaska County Bankers Association,* 260 N. W. 494, 222 Iowa 411, 107 A. L. R. 1080, it was held that where a bank had offered a reward for the capture of bank robbers by tacking up a poster containing the offer it was not an effective revocation for the cashier to remove that poster. (See also *Sullivan v. Phillips,* 98 N. E. 868, 178 Ind. 164, Ann. Cas. 1915 (B) Sec. 670.

II.

THE FINDING AND CONCLUSIONS OF LAW ARE CONTRARY TO THE LAW AND THE EVIDENCE.

(A)

ALL THE EVIDENCE CONCLUSIVELY SHOWS THAT TWO OFFERS WERE CAUSED TO BE MADE BY WARNER BROTHERS PICTURES, INC., THROUGH THEIR AGENTS AND REPRESENTATIVES — BURT LANCASTER AND THE WARNER BROTHERS PICTURES, INC., PUBLICITY DEPARTMENT AND ITS TOTALLY OWNED SUBSIDIARY, WARNER'S NEWSREEL, THE COURT NEVERTHELESS FOUND IN FINDING IX "THAT NO OFFER AS SET FORTH IN THE COMPLAINT WAS MADE BY DEFENDANT WARNER BROTHERS PICTURES, INC., OR FOR IT OR ON ITS BEHALF."

This Finding, also, inconsistently finds that "Said alleged offer was in fact expressly withdrawn before plaintiff attempted to accept the same."

Thus the finding says first that *no offer* was made; and then it says that the *offer* was withdrawn. Where a court makes inconsistent findings of fact, the judgment should be reversed since they tax judicial credulity, ignoring plain reality, and override inescapable convictions." *U. S. v. Muschany* (C.C.A. 8) 139 F. (2) 661.

Section 392, California Code of Civil Procedure.

In *Mayo v. Lakeland Highlands Can. Co.,* 309 U. S. 310, the court said:

"Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.

"It is of the highest importance to a proper review of the action of a court . . . that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure."

The findings find (1) that there was no contract; (2) that there was a contract, but that it was withdrawn; (3) that there was a contract which was not withdrawn, but was not fully complied with by the plaintiff (Findings IV and V). The court finds that Burt Lancaster did not perform the stunts shown in the picture to have been performed (Finding X) but that he did perform all his daring stunts shown in the picture.

Thus, the findings represent characteristically defenses often set up in criminal cases—"There was no conspiracy; if there was a conspiracy, I didn't join it; if I joined it I withdrew before the conspiracy went into effect; if I didn't withdraw, my acts were perfectly lawful; what I did, I did in self-defense." The findings are about that consistent and that satisfactory.

Finding X is clearly against all of the evidence and the law.

In Finding X the court specifically finds that the sequence in said picture which showed the character

Dardo carrying the character Rudi for about 25 feet along the crest of a roof, in the distance, and silhouetted against the sky, was actually performed (not by Burt Lancaster) by one Don Turner, who doubled for Lancaster and who carried a midget. This finding was alone sufficient to sustain the plaintiff's case.

But, the court said that it finds that the action so portrayed "was not a stunt and was not daring or dangerous." However, the definition of a "stunt" according to Webster is as follows:

> "Stunt"—a feat or performance, as an athletic contest, striking for the skill, strength, or the like, required. Hence any unusual feat or performance, especially done to attract attention, general applause, etc."

However, the picture itself defined what is a "stunt" and what is daring or dangerous. The motion picture made a representation to the public in this scene as being a stunt and as one that was daring or dangerous. It was not the part of the court to re-define it, as the offer of the million dollars, to-wit, Warner Brothers Pictures through its publicity department and its star Burt Lancaster, represented to the public that this was a stunt and was daring and dangerous. As such it gave its own definition to the terms of the offer, and the public and the plaintiff had a right to look to the picture as to what constituted the offered reward.

The Court further found that in the sequence which shows "the character Dardo riding into the courtyard

on a horse which he brings to a stop, and in which he steps from the horse to the bed of a stationary two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart from the courtyard, was performed by one Don Turner, who doubled in the said sequence for Burt Lancaster." (Finding X). This also was a stunt within the definition given it in the picture and entitled the plaintiff to judgment, but the court went on to find: "That the action of said sequence did not constitute a stunt nor was it daring or dangerous." This finding is unsupported by the picture itself which gave it definition, or by the evidence. It was not for the court to find contrary to the definition given by the offerers themselves as to what they deemed was a *stunt* and was daring or dangerous as shown in the picture. Furthermore, there were two offers made—one was through the medium of the Los Angeles Mirror, (R. 305), which made the offer of the $1,000,000 "for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in the new picture." That offer did not define or limit the offer to "daring stunts" but all the stunts which Burt Lancaster is shown doing in this picture. After the publication in the Los Angeles Mirror was seen by the Publicity Department of Warner Brothers no offer was made to correct it or change it, but every effort was made to take full benefit of the publicity which was given to it. An offer thus espoused by the Studio Publicity Department is binding upon them, and the court erred

in its finding attempting to limit the stunts to those that were "daring or dangerous."

The second offer through Warner Brother's Newsreel did mention the word "daring". It stated that it was a genuine bona fide offer. (R. 314). The offer proposed and represented that Lancaster was doing somersaults from six horizontal bars sixty feet in the air. (R. 313). Actually the proof by the plaintiff showed that he was not over 20-feet in the air.

The evidence also showed that in the sequence where the band rides into the courtyard to rescue Papa Pietro with sapling spears, in which there was a hand-to-hand encounter, Don Turner doubled for Burt Lancaster in the part of Dardo, (R. 165) and that Turner rode into the square and engaged in some part in the fight with the soldiers where he was using the sapling spears. And, then in the following sequence, where the character Dardo jumps onto the ex-cart and cuts Papa Pietro down and drives the team out of the square, he doubled for Burt Lancaster. (R. 166). In the character of Dardo he drove one horse out. In the next sequence, near the end of the picture, there is a sword fight between Alessandro and Dardo that occurs there at the time that Dardo kills Alessandro, which occurred in the castle shortly before the time that Ulrigh was killed by the bow and arrow by Dardo, Don Turner played the part of Dardo in two shots in the picture. In that duel, his back was to the camera. (R. 166, 167).

Under Federal Rule of Civil Procedure 52(a), it is contemplated that there be a system of findings which are of fact and definite.

Footnote, headnote 3, Dalehite v. United States, 346 U. S. 24, 25, 97 L. Ed. 1435.

When Findings of Facts by a trial court are clearly erroneous, judgment should be reversed.

United States v. U. S. Gypsum Co., 333 U. S. 395.

A finding is clearly erroneous when the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

United States v. U. S. Gypsum Co., 333 U. S. 395, 92 L. Ed. 766.

When a finding is against the weight of the evidence it is clearly erroneous, Rule 52(a), Federal Rules of Civil Procedure.

Maple Island Farm v. Bitterling, 209 Fed. (2) 867;
Kasper v. Baron, 207 Fed. (2) 744;
Aetna Life Ins. Co., v. Kepler, 116 F. (2) 1.

(B)

THE CONCLUSIONS OF LAW, THUS DRAWN FROM THE INCONSISTENT FINDINGS WERE LIKEWISE INCONSISTENT. (R. 45).

The first conclusion is that no valid offer was made by Warner Brothers. The second, that the offer was not accepted until after the same was withdrawn, which is inconsistent with the fact that no offer was made because it could not be withdrawn if no offer was made.

The third conclusion that Burt Lancaster himself did perform all his daring stunts in the motion picture The Flame and the Arrow presupposes that there was a valid offer made and accepted, but that the proof did not measure up to the offer as made, which is inconsistent with the other findings and conclusions.

And, the fourth conclusion "That the sequences shown in the picture The Flame and the Arrow wherein Don Turner appeared as a double for Burt Lancaster were not stunts and were not daring or dangerous" is an admission that Don Turner did appear in place of Burt Lancaster, and that he did appear in what the picture represented and portrayed as stunts, and that it was not Burt Lancaster. The conclusion is inconsistent with the definition by the motion picture itself as to what is a stunt and what is daring.

The conclusions, clearly erroneous under Rule 52(a) F. R. C. P. therefore, are contrary to the law and the evidence and entitled the plaintiff to his recovery.

Morris v. Williams, 149 Fed. (2) 703, 707, and see cases supra;

S. Bicca-Del Mac v. Michins Shoe Co., 145 F. (2) 389, 407.

III.

THE COURT ERRED IN ITS RULING THAT THE OFFERED REWARD HAD BEEN WITHDRAWN PRIOR TO THE ACCEPTANCE THEREOF.

The withdrawal was attempted by attorney Gordon L. Files, representing Warner Brothers, after the plaintiff had notified him that he would prove that Burt Lancaster did not perform all the stunts shown in the picture.

A published offer of a reward can only be withdrawn in the same form and manner in which it was made, and where it is offered through motion pictures and broadcasts and through the newspapers, it can only be withdrawn in the same manner.

Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697;

Restatement of Law on Contract, Section 43.

"A. Mr. Garrison or a person who introduced himself as Jules Garrison, and it was the same voice that I had talked to the first time, telephoned me at my office, and got me on the phone and asked me what we had decided to do. I told him that I had made some investigations and it was our position that no offer had been made; that if he thought there had been any offer made it is withdrawn and he should consider it withdrawn. I told him further that I had made some investigation as to how the picture had been made and that it was our understanding that Mr. Lancaster had performed all of his own stunts in the picture." (R. 191.)

The abortive attempt by the attorney to withdraw the offer by this individual communication was therefore of no effect and did not constitute a withdrawal. The withdrawal had to be in the same form and manner in which the original announcement was made, or at least through the same medium. There was no attempt to withdraw at any time, even to this date, either through the Los Angeles Daily Mirror or through the Warner Brothers' Newsreel.

IV.

THE DISTRICT COURT ERRED IN DECIDING AND FINDING THAT THE ACTS OF THE HERO IN THE PICTURE PERFORMED BY DON TURNER IN PLACE OF BURT LANCASTER WERE NOT "STUNTS" WITHIN THE MEANING OF THE OFFER OF THE REWARD.

Definition as to what constituted a stunt was given by the picture itself. The word "stunt" must be taken in its usual and ordinary meaning. That definition has been previously set out herein.

Coupled with the definition was the picture's own depicting of what were stunts and also what might be deemed to be daring.

V.

THE DISTRICT COURT ERRED IN FAILING TO MAKE FINDINGS IN ACCORDANCE WITH THE ADMITTED AND UNDISPUTED EVIDENCE.

As are set out in specification VI supra, a party is entitled to specific findings on undisputed evidence Rule 52 F. R. C. P.

VI.

THE DISTRICT COURT ERRED IN DENYING PLAINTIFF REASONABLE EXPENSES AND REASONABLE ATTORNEY'S FEES UNDER RULE 36 AND RULE 37(c) RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES.

Upon request for admissions by the defendant as to the part played by Burt Lancaster and Don Turner in the picture The Flame and the Arrow, the defendant falsely answered the same. This was admitted in the affidavit of Eugene D. Williams, one of the attorneys for Warner Brothers Pictures, Inc., as follows:

> "That the person in the motion picture 'The Flame and the Arrow' portraying the character 'Dardo' in the sequence where 'Dardo' carrying 'Rudi' is shown in a long shot running along the crest of the roof of a church or high building was not portrayed by Burt Lancaster, but was portrayed by a double, Don Turner. There is, how-

ever, another sequence immediately preceding that sequence in which Burt Lancaster in the character of 'Dardo' does carry the midget depicting the character 'Rudi' along the lower edge of the same roof and therefore in respect of that latter sequence the answer to the Request for Admissions is true, while in respect to the former sequence it is not true." (R. 66.)

The affidavit thereafter seeks to justify the false answer to Interrogatory No. 3. However, Rule 37(c) provides for the payment of counsel fees and costs where a false admission is made. The reasons for the false admission do not waive the requirement of payment; otherwise the rule would be a nullity.

Modern Food P. Co. v. Chester Pack. etc. Co., 30 Fed. Supp. 520;
Metropolitan Life Ins. Co. v. Everett, 15 F. R. D. 498, 499.

WHEREFORE, plaintiff prays for reversal of the judgment and order below on each of the grounds set forth in this brief, with directions to the court below to enter judgment for and on behalf of the plaintiff for One Million Dollars with interest, and costs; and to enter judgment for the plaintiff for costs and attorneys fees under Rule 37(c), Rules of Civil Procedure for the District Courts of the United States.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.